UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ENTERGY NUCLEAR OPERATIONS, INC.,

and

UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL 25

Cases 01-CA-153956
01-CA-158947
01-CA-165432

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DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Boston, Massachusetts, on October 17, 18, and 19, 2016. The United Government Security Officers of America, Local 25, (Union or Charging Party) filed the initial charge on June 11, 2015, and amended that charge on September 1, 2015. The Union filed additional charges on August 27, 2015, and December 3, 2015, and amended those charges on December 3, 2015, and March 31, 2016, respectively. The Regional Director for Region One of the National Labor Relations Board (NLRB or Board), issued the original complaint on September 30, 2015, the consolidated amended complaint on December 31, 2015, and the second amended consolidated complaint (Complaint) on May 31, 2016. The Complaint alleges that Entergy Nuclear Operations, Inc. (Respondent or Company) violated Section 8(a)(3) and (1) and Section 8(a)(1) of the National Labor Relations Act (the NLRA or the Act) when it issued a verbal warning to Jamie Amaral and, in addition, violated Section 8(a)(1) by maintaining a variety of overbroad rules and policies that interfere with employees' exercise of their rights under the NLRA. The Respondent filed a timely answer in which it denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a nuclear power plant located in Plymouth, Massachusetts, where it annually derives gross revenues in excess of $250,000, and annually purchases and receives goods valued in excess of $5000 directly from points outside the Commonwealth of Massachusetts. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the NLRA and that the Union is a labor organization within the meaning of Section 2(5) of the NLRA.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND

The Respondent operates a nuclear power plant, referred to as the Pilgrim Nuclear Power Station, in Plymouth, Massachusetts (the Plymouth facility). Since 2007, the Union has represented the nuclear security officers employed by the Respondent at the Plymouth facility. The security force at the facility is a paramilitary organization and has a presence at the facility 24 hours a day. The alleged discriminatee in this case, Jamie Amaral, is a nuclear security officer and credibly described her duties as "protecting the plant and the community from nuclear sabotage, controlling access and egress of any plant or visitor personnel, vehicle searches, day-to-day plant support, and overall protecting the plant." Amaral works a 12½ hour shift that begins at 5:45 am and ends at 6:15 pm and which may fall on either weekdays or weekends. On February 10, 2015, Amaral became a shift steward for the Union, one of approximately 19 stewards at the facility. In that capacity, Amaral addresses concerns expressed to her by unit members regarding safety issues and "overall issues with our department." Transcript at Page(s) (Tr.) 83. She serves as the employee's "voice," by writing condition reports, acting as a mediator, or raising the issue with higher level union officials. Ibid. On March 13 – a little over a month after Amaral became a shift steward – the incident took place upon which the Respondent ostensibly based the allegedly discriminatory verbal warning.

The Respondent's Plymouth facility is subject to oversight by the Nuclear Regulatory Commission (NRC), a federal agency. The NRC accomplishes this oversight not only through the promulgation of federal register notices and other publications, but also through the assignment of three NRC employees to work full-time at the Plymouth facility as "resident inspectors." These resident inspectors have offices at the Plymouth facility and monitor the facility's compliance with NRC requirements. The testimony indicated that the NRC has recently found the Respondent's compliance with NRC standards to be poor. The NRC oversight program has five ratings, referred to as "columns." A column one rating is the best, and each rating from column two to column five denotes an increasingly unsatisfactory level of performance and triggers additional oversight. If a facility is rated at column five, the NRC issues a shutdown order for the facility. In September 2015, the NRC gave the Plymouth facility a column four rating. The record does not reveal the specific circumstances that led to this rating.

Among the requirements that NRC regulations place on nuclear power facilities is that those facilities provide a process by which employees' concerns regarding conditions at the facility can be raised and addressed. The Respondent has instituted a number of reporting avenues at the Plymouth facility and, as is discussed below, these are relevant to the issues regarding alleged discrimination against Amaral. One avenue is for an employee to electronically submit a "condition report," often referred to in the record by the initials "CR." After a condition report is submitted, it is reviewed and prioritized by "coordinators," then transmitted to a review group chaired by the facility's general manager of plant operations, and then assigned to an organization or individual for resolution. After a condition report is filed, employees are able to electronically monitor the progress of the employer response. Employees may submit their condition reports anonymously or they may choose to identify themselves.

A second reporting avenue is for the employees to submit their concerns to the Respondent's full-time "employee concerns program coordinator" – an individual who is neither a member of management nor a bargaining unit employee. The employee concerns program coordinator is responsible for advocating on behalf of employees. Employees may approach the employee concerns coordinator either by coming to her office or by approaching her as she circulates through the facility. A third reporting avenue is for the employees to submit concerns by phone to the Respondent's "ethics line." Employees are also entitled to raise their concerns through the contractual grievance process, by bringing those concerns directly to their managers, or by notifying the NRC or its resident inspectors.

B. Incident on March 13 and Verbal Warning Issued to Amaral

Amaral is a nuclear security officer and has worked at the Plymouth facility for over 12 years. When performing her duties, Amaral is armed and carries weaponry and protective gear weighing up to 50 pounds. On February 10, 2015, her co-workers elected her to serve as a Union shift steward. At the time, there were a total of 19 shift stewards at the facility, six of whom worked on the same shift as Amaral. The evidence shows that as of March 6, 2015, at least one of the Respondent's managers had notice that Amaral was a steward. On that date, the Union sent an email message to Richard Daly – the Respondent's security superintendent – identifying 17 union stewards, including Amaral, who would be attending training for stewards. Daly replied and also included Phil Beabout – the Respondent's security manager – in the email chain that listed the participating stewards. In addition to being a union steward, Amaral was known for submitting a large number condition reports. During the year leading up to trial, Beabout commented on this, telling Amaral that her frequent use of the process made her a "pain in the ass," but also telling her that he understood that she filed the condition reports because she was passionate about the job and employees' working conditions. During Amaral's employment, the Respondent awarded a number of commendations to her – including "employee of the month" in her department, "best of the week," and multiple "good catches."

In March of 2015, Amaral was assigned to a post known as the "primary gate." The primary gate is a bullet proof enclosure from which an officer monitors the area where individuals enter the facility and undergo security screenings similar to those administered at airports. Visitors and employees – including the security officers who are themselves assigned to the primary gate – must undergo security screening before continuing into the facility. At any given time, there are one or two employees working in the primary gate, usually without a

supervisor physically present at the post. Security officers assigned to the primary gate may not leave that post until another security officer arrives to relieve them.

For many years there has been a water dispenser[1] in the area just outside one of the doors into the primary gate. Security officers assigned to the primary gate may obtain drinking water from this dispenser in a matter of seconds and without the necessity of arranging for another security officer to relieve them. If this dispenser is absent, as it was during a period in March 2015, a security guard assigned to the primary gate cannot reach a water dispenser without leaving the post and going to another building in the complex. A security officer who does this must first await the arrival of a relief officer and then cannot return to the primary gate post without submitting to another security screening.

Shortly after Amaral arrived for work on Friday, March 13, 2015, she was approached by employees who complained to her that the water dispenser at the primary gate had been removed and asked Amaral what action she was going to take about it. Amaral reacted quickly. She submitted an condition report, time stamped at 7:02 am, complaining about the removal of the water dispenser and stating that she had discovered its removal at 6:43 am, 19 minutes earlier. In this condition report, Amaral also stated that the water cooler had been removed two days earlier and that "supposedly" it was removed because of an odor and a "mildewy" rug. She wrote that "[b]eing at the mercy of other depts. to supply the Security Force with bottled water is not a resolve." The Respondent assigned this condition report to Beabout and Daly for further action.

Later on the same day that Amaral filed the condition report, she saw Bill Mock, the Respondent's facilities superintendent, proceeding through security and confronted him about the removal of the water dispenser. Mock told Amaral that he believed the dispenser was removed due to "a filter issue." Amaral told Mock, "then change the filter." Mock responded by saying that employees could bring water bottles with them and that there were other water dispensers around the plant" and by questioning whether a water dispenser was necessary at the primary gate location. Later when one of the Respondent's out-of-state investigators interviewed Mock about the events of March 13, he reported that Amaral was very upset during this exchange and that her conduct made him uncomfortable. Later, but still on March 13, Amaral approached another company official – Paul Tetreault, the Respondent's security operations supervisor – and asked whether the water dispenser would be returned to the primary gate area. Tetreault indicated that he did not think the Respondent would return it. When Amaral asked why, Tetreault responded by pointing towards the offices of the upper level managers and stating "because they don't want to." According to Amaral, at this point her "frustration level was kicking in."

Later on March 13 – still on the same day that Amaral discovered that the water dispenser had been removed – Amaral complained for a fourth time about the issue. This time she initiated a discussion regarding the subject with Kristie Lowther, the Respondent's employee concerns program coordinator. It is Amaral's behavior during this encounter that the Respondent points to as justification for the verbal warning issued to her. Amaral and Lowther were the only witnesses who testified about the encounter and their testimony was, in many respects, consistent. They agreed that the encounter began in a restroom at the facility, that they discussed removal of the water dispenser, and that Amaral raised her voice and used profanity. Amaral's and Lowther's testimonies regarding the encounter were inconsistent in some other respects and to the extent that there are such inconsistencies, I credit Lowther's

[1] This water dispenser is sometimes referred to by witnesses as a water "cooler" or water "bubbler." It is connected to a water line that continuously supplies water to it.

account over Amaral's. Amaral herself indicated that her agitated stated clouded her perception during the key encounter. She testified that during the encounter she became so agitated that she "was seeing red" and "kind of like blacked out . . . in my head." Tr. 130. After first testifying that a particular portion of her exchange with Lowther took place in the hallway, she conceded that, in fact, she could not remember whether it took place in the hallway or in the restroom. Tr. 200-201. Not only was Amaral's perception clouded during the key incident, but I found her a less than fully credible witness based on her demeanor, testimony, and the record as a whole. While testifying, Amaral seemed to strain to provide support for the discrimination allegation. For example, she stated that when she arrived at work on March 13 not only did co-workers complain to her about the missing water dispenser, but that "too many [co-workers] to count" had done this. However, Amaral could not remember the identity of a single one of the supposedly countless co-workers who approached her. Tr. 101-102.[2] On the other hand, I found Lowther a particularly credible witness based on her demeanor, testimony and the record as a whole. The account that Lowther provided in the "rapid resolution report" that she submitted on March 19 regarding the incident, Respondent's Exhibit Number (R Exh.) 9, corroborated her account at trial. Moreover, the record provides no basis for believing that Lowther was biased against the Union, Amaral, or Amaral's protected activity. Lowther was not a member of management, but rather an employee whose job it was to advocate for employees at the facility. During the relevant time frame, Lowther did not know that Amaral had recently become a shift steward and she was not one of the individuals who made the decision to issue the verbal warning to Amaral. To the contrary, Lowther's testimony left me with the impression that it pained her to report the incident with Amaral to the Respondent, and, indeed, it is undisputed that Lowther first attempted to avoid doing so by reaching out to Nate Reid, the Union's chief steward. It was only after Reid refused to assist her that Lowther reported the incident to the Respondent.

Based on Lowther's testimony and the other credible evidence, I find that the incident between her and Amaral on March 13 occurred as follows. The two employees were in the women's restroom washing their hands. Amaral was visibly upset, and said "I can't believe they took the water bubbler out of the primary gate." She asked Lowther what to do about it. Lowther told Amaral that she should "write a c[ondition]r[eport] or contact Bill Mock." Amaral responded: "[I]t's fucking bullshit . . . . It's fucking bullshit. I shouldn't have to rely on people to get water for me when I'm . . . at the primary gate." Lowther told Amaral that she thought removal of the water dispenser had to do with a "safety concern" related to operating equipment on "temporary power supply." Amaral said that she believed the water dispenser was removed because of "the smell" and that she had already written a condition report and talked to Mock about the issue. The conversation became progressively more heated and Lowther described the exchange as "definitely uncomfortable and not really professional, especially in the lady's room." As Amaral became more agitated, Lowther's level of discomfort led her to feel she "needed to exit the lady's room." When Lowther left the rest room, Amaral followed her out into the hallway and continued talking to her in a loud voice. Lowther did not respond, but Amaral continued making profanity-laced complaints to her. Amaral told Lowther that "morale in security fucking sucks," and that Lowther "need[ed] to do something about it." As mentioned above, Amaral is armed at work and was, in fact, carrying a weapon during this exchange with Lowther. Lowther testified that while she felt Amaral was behaving in an unprofessional manner, Amaral's behavior did not actually cause her to feel "threatened."

The following Monday, March 16, Lowther contacted Reid (chief steward) and asked him if he could talk to Amaral about what Lowther characterized as Amaral's "unprofessional

[2] Although I find that Amaral's claims on this score were inflated, I credit her uncontradicted testimony that unit employees alerted her to the removal of the water dispenser and encouraged her to take action.

behavior." Reid declined, stating that Amaral was "upset about things" and that he "didn't want to deal with her." Lowther asked whether Reid could have Tim Hart, another union steward, contact Amaral about the matter, but Reid responded that Hart did not "want to deal with Amaral either." Lowther told Reid that she believed that it could be detrimental to her effectiveness as employee concerns program coordinator if employees heard Amaral yelling at her in the hallway.[3] She told Reid that she would prefer to resolve her concerns through the Union, but would contact the Respondent's human resources department the following day if the Union did not contact her regarding Amaral's behavior.

No one from the Union followed-up with Lowther, and on Tuesday, March 17, she discussed her concerns about Amaral's behavior with Brenda Gailes, a human resources manager at the Plymouth facility. Gailes told Lowther "to file something with the ethics line or go to talk to the security manager or superintendent and explain what happened." Lowther met with Beabout (security manager) and Daly (security superintendent) and gave her account of what had transpired with Amaral on March 13. Daly referred the matter to the Respondent's ethics line, which resulted in it being assigned to an investigator – Gillian Taylor – who was stationed in the Respondent's New York facility, but who was present at the Plymouth facility to investigate an unrelated matter.

Taylor interviewed three individuals. The first one was Lowther, who Taylor contacted on March 19. Next, Taylor interviewed Mock, and lastly she interviewed Amaral. Taylor testified that Amaral appeared upset during the interview and complained about the removal of the water dispenser. Amaral told Taylor that the security officers were being "treated like shit" and "messed with" regarding the water dispenser. She told Taylor that she had "had it," and "was at actual wit's end." Amaral confirmed that she had used profanity during the encounter with Lowther. She told Taylor that she was shocked to be investigated for using profanity since the use of such language was commonplace at the facility. At the interview, Amaral was accompanied by Mike Uvanitte (union steward) and Amaral did not state, and Taylor did not know, that Amaral herself had recently become a steward. After interviewing these three witnesses, and without performing any additional investigation, Taylor concluded that "the concern that Ms. Amaral acted in an unprofessional manner was substantiated" based on Amaral's admission that she had "cursed at and screamed at Ms. Lowther in the hallway." Tr. 391. Taylor's written report states that "Ms. Amaral's behavior with Ms. Lowther was a violation of the Entergy Code of Entegrity and the Entergy Discrimination and Harassment Policy." General Counsel's Exhibit Number (GC Exh.) 23 at Page 1. Taylor did not conclude that Amaral posed a threat to anyone at the facility.

The Respondent decided what action to take – in light of Taylor's findings – during a "consensus meeting" of managers. The managers who participated in the consensus meeting were: Daly, Tetreault, and Brandy Green (human resources management support representative). They decided that Amaral would receive a verbal warning, the lowest level of discipline in the Respondent's progressive discipline system. Green informed Gailes about the decision, and Gailes said that she "had no problem" with it. At the time Gailes was unaware that Amaral had recently become a shift steward. The Respondent issued the verbal warning to Amaral on May 25, 2015. Daniel Jenkins, who was Amaral's direct supervisor, signed the verbal warning document and presented it to Amaral. The letter stated that Amaral had violated section 3 of the code of entegrity and section 4.3 and section 5.5 of the discrimination and harassment policy.

[3] The record evidence indicated that employees were likely present in areas where they would have been able to hear Amaral shouting profanities during her exchange with Lowther, however, there was no evidence showing that other employees actually did hear any part of the relevant exchange.

The record evidence shows that subsequent to the March 13 incident upon which the Respondent relies to justify the verbal warning, but before the issuance of that warning, Amaral continued to protest the removal of the water dispenser from the primary gate. Amaral filed subsequent condition reports regarding the dispenser on March 14 and 18. David Noyes, who at the time was the Respondent's regulatory assurance and performance improvement director, learned through his routine review of condition reports that Amaral had complained about the removal of the water dispenser, and Noyes also noted that the tone of one of those condition reports suggested that Amaral was highly frustrated. Noyes reached out to Amaral about the issue and discussed it with her on March 16. Immediately after that discussion, Noyes directed Mock to either replace the water dispenser at the primary gate or otherwise arrange for the security officers there to have a continuous supply of water. Noyes told Mock to complete this action within the next 5 days. Either that day, or the next day, Noyes informed Amaral of the status of the issue, and after that a water dispenser was once again placed at primary gate. When he took these actions, Noyes was unaware of the incident between Amaral and Lowther. The testimony suggests that the water dispenser was returned to the primary gate in the latter portion of March 2015, but a printout of the condition report record indicated that this may not have happened until April 2, 2015.

After Noyes had these conversations with Amaral, he participated in a regularly scheduled meeting with Lowther, during which Lowther informed him about the altercation with Amaral over the water dispenser issue. Noyes discussed the incident with Beabout and Daly and instructed Beabout to keep him apprised of the disposition regarding the matter. Noyes was part of discussions regarding the discipline to be issued to Amaral, and Beabout was under Noyes' supervision, but Noyes was not the approving official and did not sign off on the decision. During this period of time, Noyes was unaware that Amaral had recently been elected to serve as a shift steward.

On June 13, 2015, the Union filed a grievance over the discipline issued to Amaral.

C. Use of Profanity At Plymouth Facility

The record evidence establishes that the use of profanity by unit employees, as well as by supervisors and managers, was commonplace at the Respondent's facility. Most of the testimony about this concerned instances when the profanity was used in a joking or grousing manner, not as part of an angry outburst directed at a particular individual. There was credible testimony that such language was sometimes used in a more emotionally charged manner, but that such instances were "rare." Tr. 55-56.

One recent incident occurred in July or August 2016, when a shift supervisor directed the security officers to come to the facility for a mandatory 4-hour overtime shift in order to participate in training. Adam Cerulli – who was the chief steward of the unit and also a security officer – reacted by telling the supervisor, "We don't work 4-hour shifts and we sure as shit don't get mandatory for them." The record does not show whether the supervisor reported this conduct or sought to have Cerulli disciplined, but does show that Cerulli did not, in fact, receive discipline. In May 2015, Timothy Hart, who was chief steward at the time, was having a conversation with Daly about the Respondent's decision to suspend a unit employee. Hart said that Daly was "really screwing" and "fucking over" the employee. Hart told Daly that he was "really fucking disappointed." Hart was not disciplined for using this language.

The record establishes two incidents in which individuals were formally disciplined for behavior that included the use of profanity. In one incident, in either 2013 or 2014, a shift

supervisor was suspended under the Respondent's harassment/discrimination policy for wearing a hat on which was written "HMFIC" – which was understood to mean "Head Mother Fucker in Charge." In another instance, occurring in mid-2014, a supervisor caught three security officers violating a procedure and, when the supervisor confronted the security officers about the violation, one of the officers – Brandon D'Andrea – responded by directing a profanity at the supervisor. All three officers received a 1-day suspension for the failure to follow procedures, but D'Andrea received an additional 2-day suspension, under the harassment/discrimination policy, for directing the profanity at the supervisor.

There are two other instances in which the record shows that profanity was used in an emotionally charged way, but fails to show whether any formal discipline was issued. One of these instances occurred approximately 5 years ago between a supervisor and an employee who was, at-the-time, president of the local union. According to the testimony, the supervisor and the union president were standing very close to one another and shouting "get the fuck out of my face" and "fuck you." The record does not show whether any discipline was sought, or issued, to either of these individuals. The second incident occurred in mid-2015 and involved Amaral. Amaral commented to a co-worker that Ryan Savje, a supervisor who was checking employees' weapons back into the armory, was working too slowly. Savje heard Amaral's comment, and responded "Shut the fuck up, Jamie." Amaral complained about Savje's remark to Jenkins, her direct supervisor. The next morning, Jenkins told Amaral that he had spoken to Savje. Jenkins reported that Savje said that he was "kidding" when he made the comment to Amaral. The evidence does not show whether Savje was disciplined for this incident.

D. NRC Regulation of Facility

As alluded to above, the NRC provides oversight to nuclear power plants like the Plymouth facility, including by stationing NRC inspectors at the facility. In 2011, the NRC published a safety culture policy statement in the federal register. That policy statement provides that "all individuals and organizations, performing or overseeing regulated activities involving nuclear materials should take the necessary steps to promote a positive safety culture by fostering" nine "traits" of a "positive safety culture." One of the traits of a positive safety culture that the NRC identified is "a respectful work environment" in which "trust and respect permeate the organization." Federal Register, Vol. 76, No. 114, Page 34773 et seq. In March 2014, the NRC published a document, entitled "Safety Culture Common Language," which further explains what it means by "respectful work environment." That document states that a "respectful work environment" means, inter alia: "Individuals at all levels of the organization treat each other with dignity and respect. Individuals treat each other with respect within and between work groups. Individuals do not demonstrate or tolerate bullying or humiliating behaviors." R Exh. 5 at Page 23.

E. Challenged Employer Provisions

The General Counsel alleges that the Respondent maintains numerous over broad policies that unlawfully interfere with employee activities that are protected by Section 7 of the NLRA. The policies at-issue include the Respondent's policies on discrimination and harassment prevention, employee use of internal and external social media sites, protection of information, issue resolution, and government investigations, as well as the Respondent's "code of entegrity," which places a variety of restrictions on employees, including in some areas that are also addressed in the separate policies listed above.

The Respondent has maintained the code of entegrity since at least December 11, 2014. The Complaint includes allegations that numerous provisions in the code of entegrity offend the NLRA. Those provisions are the following:

> Foreword B.3. Be a courteous driver: *Respect the workplace.* Just as drivers have a responsibility to care for their passengers, Entergy employees have a responsibility to be civil and respectful to co-workers during workplace interactions.
>
> Foreword B.6. Don't hand the keys to a stranger: *Protect company property and information.* Motorists protect their property by locking the doors and securing the keys. At Entergy, we must also protect our assets, whether in the form of personal property, real estate, information, records or electronic files.
>
> Section 3. BE A COURTEOUS DRIVER: Respect the Workplace
>
> A. DISCRIMINATION AND HARASSMENT
> Entergy seeks to maintain a work environment that respects the dignity and worth of each individual and is free from harassment and discrimination based on any protected characteristics or protected activities. Protected characteristics include race, color, sex, religion, pregnancy condition, national origin, age (40 and over), sexual orientation, gender identity and/or expression, veteran's status, marital status, qualified disability, genetic information (which includes family medical history) or any characteristic protected by law. Protected activities include, for example, filing a claim with the Equal Employment Opportunity Commission or another governmental entity.
>
> Examples of prohibited conduct when based on a protected characteristic or a protected activity include, but are not limited to, the following:
>
> - Denying equal employment opportunities.
> - Making, transmitting, intentionally accessing, displaying or circulating offensive or derogatory statements, comments, jokes, slurs, gestures, pictures, e-mails or links.
> - Creating an offensive, hostile or intimidating working environment.
> - Engaging in unwelcome flirtation, sexual advances, requests for sexual favors, propositions, touching and other verbal or physical conduct of a sexual nature.
>
> Entergy's policy is intended to extend further than the law in order to maintain a work environment that is inclusive and respects the dignity and worth of each individual. It prohibits abusive conduct that Entergy determines is inappropriate, which can include intimidation, coercion or bullying, regardless of whether such conduct is unlawful or based on a protected characteristic or

protected activity. Please refer to the Discrimination and Harassment Prevention Policy for details.

Section 5. I. GOVERNMENT INVESTIGATIONS AND INTERACTIONS
All government requests for inspections, investigative interviews or documents should be referred to the Legal department for review and further instruction. Additionally, except to the extent that interaction with governmental agencies is part of an employee's job function, the employee should contact the Legal department before contacting a governmental agency about the company's business.

Section 6. DON'T HAND THE KEYS TO A STRANGER
Protect Company Property and Information

B. COMMUNICATIONS
Two of Entergy's core values are "act with integrity" and "treat people with respect." Employees should consider these values in all communications. For example, don't include material that is inappropriate, untrue or disparaging to outside parties or to Entergy. A good question to ask is, "Would I want this message published in the news and attributed to me?" Also, take extra care when sending sensitive content in electronic messages because further distribution is virtually impossible to control. If there is a need to limit the further distribution of messages, let the recipients know.

C. COMPANY PROPERTY

The misuse or theft of company property affects the company's profitability and, ultimately, all of our jobs. Company property includes but is not limited to:

• Entergy information.

We are all responsible for protecting company property from theft, fraud, unauthorized access and use, damage and destruction. Unauthorized or improper use of company material, time, equipment, credit cards, procurement cards, or other property is prohibited. Also, we must not offer company property, company loans or unpaid company services to persons outside the company without prior written approval of senior management. All company property must be returned to the company at the termination of employment. Always report any theft or vandalism of company property.

D. COMPANY INFORMATION AND CONFIDENTIAL INFORMATION

> It is part of our jobs to prevent the misuse, theft or improper disclosure of company information. Information that is used to provide customer service, carry out company operations and report accurate data is an essential company asset and must be protected.
>
> We must take care in handling, discussing, transmitting, storing, and destroying sensitive or confidential information. We must protect such information against disclosure, either accidental or intentional, to parties, both inside and outside of the company, who do not have a legitimate business "need to know." This obligation continues even after we leave Entergy. If unsure about what constitutes confidential information, ask a supervisor or call the Ethics Line at [phone number]. Unauthorized disclosure of personal information belonging to customers, employees, vendors and other individuals must be reported to the Ethics Line immediately.

In addition to the language from Section 6 of the code of entegrity that the Complaint quotes, that Section includes language affirming employees' rights to engage in protected activity. A highlighted portion states:

> Nothing in this Code is intended to restrict an employee's rights under any federal, state or local labor or employment law, or regulation, except to the extent such rights are clearly waived by the express terms of a current collective bargaining agreement. These employee rights include, but are not limited to the right to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment such as the right to discuss his or her wages, benefits and working conditions with others.

In another portion of Section 6, the following language appears:

> The Code and this section are not intended to, and shall not restrict an employee's rights under any federal, state or local labor or employment law, or regulation, to discuss his or her salary, wages, hours, or other terms and conditions of employment with nonemployees or with other employees.

The Complaint also contains an allegation that the Respondent's policy on discrimination and harassment prevention, which has been in effect at least since December 11, 2014, is overbroad in violation of the NLRA. The Complaint identifies the following language from this policy:

> 4.3 Each Entergy employee, agent and contractor is responsible for: (a) respecting the rights of others and maintaining a workplace free from discrimination, harassment and retaliation; (b) conducting him/herself in a manner that does not violate the letter or spirit of this Policy; (c) discouraging behavior that violates this Policy; and (d) reporting any actual or suspected violations of this Policy to the Entergy Ethics Line at [phone number].

> 5.5 Other Prohibited Conduct - It is the policy of Entergy to maintain a work environment that is inclusive and respects the dignity and worth of each individual. Accordingly, the Policy extends further than the law and prohibits harassment, intimidation, coercion, bullying and other types of disrespectful or abusive conduct, regardless of whether such conduct is based on a Protected Activity, Protected Characteristic and/or otherwise constitutes a technical violation of the law. Entergy retains the sole discretion to determine whether specific behavior constitutes a violation of this Policy.

The Complaint also includes an allegation that the Respondent's policy on employee use of internal or external social media sites, which has been in effect since at least June 3, 2015, is overbroad in violation of the NLRA. The policy contains the following restrictions, and states that violations are punishable by disciplinary action:

> 5.4.4 Confidential Information. Employees shall not make available via Social Media any of Entergy's or another's confidential or other proprietary information that is to be protected pursuant to Entergy System Policies (e.g., Protection of Information Policy, Insider Trading Policy, Disclosure and Public Communications Policy).
>
> 5.4.5 Discrimination, Unlawful Harassment, Retaliation and Threats. Employees shall not engage in unlawful discrimination, harassment, retaliation or threats in violation of the Discrimination and Harassment Policy…

Section 5.4.4 of the social media policy continues beyond the portion the Complaint quotes with the following language: "Such policies shall not be construed to limit your right to speak with others regarding your wages and other terms and conditions of employment."

Since at least July 22, 2015, the Respondent has maintained a policy on protection of information, and that policy includes the following sections, which the Complaint alleges place unlawfully overbroad restrictions on employees:

> 3.1 Confidential Information – Those Information Assets that must be protected from disclosure, either accidental or intentional, due to their sensitive or proprietary nature. Confidential Information includes but is not limited to: Sensitive Information; Personal Information; customer information; passwords; vendor pricing information; information submitted by vendors with their bids; employee information; information provided in connection with employment applications (unless a waiver is secured from such applicant for specific disclosures); information provided by outside parties under a confidentiality agreement or under circumstances that indicate its confidential nature; marketing strategies and business plans; non-public financial, accounting and budgeting records; non-public research and development records; knowledge, data, or know-how of a technical, financial, commercial, creative, or artistic nature in which the Company has an ownership interest by virtue of its participation, acquisition, development, or license rights; and information that, if not properly safeguarded, might impair the security or privacy of Facilities and personnel, such as information relating to nuclear plant "protected areas,"

and "critical infrastructure information" as defined by the Federal Energy Regulatory Commission.

3.7 Information Assets - Entergy's intellectual property, information about Entergy's operations, Facilities, customers, and personnel, and any other sources of Entergy's knowledge, whether existing in written, printed, photographed, recorded, or any other electronic form. Entergy's intellectual property includes data, records, files, software developed, modified, or otherwise licensed by Entergy, any Entergy System Company name and logo, and any other Copyright-Protected Works, Trademarks, Trade Secrets, and Patents owned or licensed by any Entergy System Company. Some, but not all, Information Assets will constitute Confidential Information.

3.14 Sensitive Information - Information for which a business unit has responsibility and has determined must be afforded enhanced protection due to its highly confidential or proprietary nature. Sensitive Information includes, but is not limited to, … employee records . . . .

5.1 Protection and Unauthorized Use of Entergy’s Information Assets

5.1.2 Employees may not grant any outside party the right to use Entergy's Trademarks, including the name of any Entergy Company and any Entergy logo, or allow others to do so, without prior approval from the Manager, Advertising and Brand (or the successor position) and the applicable Functional Officer. Agents and contractors may not grant any outside party the right to use Entergy's Trademarks.

5.1.4 Employees, agents, and contractors may not use, access, distribute, destroy, modify, reverse engineer, download, photograph, video-record, audio-record, or otherwise copy Information Assets for their or an outside party's personal use, gain, or advantage, or allow others to do so, without prior approval from the applicable Functional Officer and the owner of any outside-party rights in such Information Assets.

5.2 Protection of Confidential Information. In addition to the rules above for Information Assets in general, employees, agents, and contractors shall:

5.2.1 protect Confidential Information from disclosure, either accidental or intentional, to all parties, both inside and outside of the Company, who do not have a legitimate business "need to know" for the purposes of the Company's operations or management;

5.2.2 comply with any Confidentiality or Nondisclosure Agreement that applies to such Confidential Information;

5.2.3 take care in the access to, and storage, reproduction,

control, transmission, and destruction of materials containing Confidential Information; ·

5.2.4 ensure the timely termination of access to Confidential Information by individuals who are no longer employed by Entergy or by its agents or contractors, or who otherwise no longer have a "need to know" such information to perform their job; and ·

5.2.5 not use file-sharing services that have not been approved through the GUARD process for sharing Confidential Information.

5.6 Employee Records - The Company's employee records shall be used and maintained in a manner consistent with applicable laws and regulations, and the privacy interests of the applicable employees. To the extent that employee records contain Sensitive Information, they shall be treated as Sensitive Information under this Policy, and shall be protected as described in Section 5.3 and be destroyed in accordance with Section 5.3.4. To the extent that employee records contain Personal Information, they shall be treated as Personal Information under this Policy, and shall be protected as described in Section 5.4. In addition, the following provisions apply to employee records.

5.6.1 Employee records are Company-owned and include personnel files and their contents, performance evaluations, salary level, medical data, and other information pertaining to individual employees and their employment with the Company.

5.7 Entergy Facilities and Personnel - Information pertaining to Facilities shall be safeguarded against the production and disclosure of unauthorized audio/video recordings, photographic images, or other images by Entergy employees, agents, contractors, and visitors.

5.7.1 Internal Use - Entergy employees, agents, contractors, and visitors may not take photographs or make audio/video recordings on or at Facilities to the extent such activity photographs or records Confidential Information, unless doing so is (1) part of the employee's job duties and undertaken for Entergy's normal business purposes, including, but not limited to authorized security investigations, Company-sanctioned security systems, safety meetings, training, informational presentations, or repair, operation or maintenance of such Facilities or (2) part of the scope of work that Entergy has engaged a contractor or agent to perform.

5.7.2 External Use - Employees, agents, contractors, and visitors may not take photographs or make audio/video recordings on or at Facilities for external use, except with the written approval and signature of the Entergy manager responsible for such Facility. External use also requires approval from Corporate Communications, or the Legal Department in the case of legal proceedings. (Access to any Facility for the purpose of

photographing or making an audio/video recording may also require the execution of an access agreement.)

5.7.3 Personnel Privacy - Use of photographic, audio, or video recording equipment is strictly forbidden in areas where employees, agents, and contractors have a reasonable expectation of privacy (i.e., bathrooms, exercise facility dressing/locker rooms, etc.) unless:

5.7.3.1 There is a valid business reason for taking photographs or making audio or video recordings in the area;

5.7.3.2 All personnel and visitors in the area at the time are aware of activities related to the photographs or audio/video recordings; and

5.7.3.3 Written permission has been granted by the Entergy manager overseeing the Facility in advance of the recording activities.

5.7.4 Business Unit or Site Policies - In addition to the provisions above, employees, agents, contractors, and visitors must act in accordance with any applicable business unit or site-specific directives regarding the production or disclosure of photographic, audio/video recordings or other images.

5.7.5 Confiscation of Unauthorized Images/Recordings - Anyone caught using photographic, video and/or audio equipment in violation of this Policy is subject to disciplinary action as set forth in Section 5.9 and to having all such equipment detained for examination by Entergy personnel. Any resultant unauthorized images or recordings may be copied and retained by Entergy and/or deleted or destroyed regardless of the media.

Section 5.6 of the protection of information policy, which is devoted to employee records, also include the following provision:

5.6.3 Nothing in this Policy is intended to restrict an employee's rights under any federal state or local labor or employment law, or regulation, except to the extent such rights are clearly waived by the express terms of a current collective bargaining agreement. These employee rights include, but are not limited to, the right to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment, such as the right to discuss his or her wages, benefits and employment conditions of others.

Since at least October 1, 2015, the Respondent has maintained a policy on issue resolution for employees outside the bargaining unit. That policy describes the Respondent's

internal process for resolving issues that arise between non-unit employees and the Respondent. The policy contains the following confidentiality restriction, which the Complaint alleges is overbroad in violation of the NLRA.

> 5.13 Confidentiality - All communications and documents generated during this process will be treated as confidential. Disclosure, circulation, distribution, or discussion of the information collected by the Panel should be limited to those individuals who have a legitimate business need to know the contents. Release of any of this information beyond this limited circulation must be approved by the Senior Vice President Human Resources/Chief Diversity Officer.

Since at least October 1, 2015, the Respondent has maintained a policy on government investigations, which contains the following, allegedly overbroad, restrictions:

> I. POLICY SUMMARY
>
> - Employees, agents and contractors approached by someone claiming to be a government investigator should contact a lawyer in the Company's Legal Department before answering any questions, providing any documents, or allowing access to Company facilities.
>
> 5.1 General. The Company is committed to cooperating with government agencies conducting investigations of alleged wrongdoing at the Company. When doing so, two goals are of prime importance: Government investigators must obtain a complete and accurate picture of the Company, and the Company must protect its legal rights. These two goals can best be reached by properly coordinating response to government investigations.
>
> 5.2 Legal Department Review. It is the Company's policy that all Subpoenas, Search Warrants, Civil Investigative Demands, written complaints, and requests for investigative interviews or documents be referred to the Company's Legal Department for review.
>
> 5.3 Government Investigator Activity. Government investigators may arrive unannounced at Company facilities or at the residence of present or former employees, agents or contractors and seek interviews and documents. Such persons when approached by someone claiming to be a government investigator shall, if possible, contact a lawyer in the Company's Legal Department before answering any questions, providing any documents, or allowing access to Company facilities. The Company's lawyers can instruct more fully on duties. Employees, agents and contractors shall not answer any questions, produce any documents, or allow access before making necessary contacts with Legal. However, if government investigators possess a search warrant and will not allow time to make such contact before executing the search warrant, employees, agents and contractors shall not prevent the investigators from proceeding but shall monitor their activities and contact Legal for additional direction.

5.4 Government Requests for Documents. Employees, agents and contractors may be asked by government investigators to provide documentation related to a government inquiry or investigation. Even if an employee, agent or contractor created, keeps, or updates documentation, it is nonetheless the Company's property. Employees, agents and contractors do not have the authority to produce documentation for the investigator without undertaking and following the steps below before disclosing any documentation to the government agency. If a Search Warrant is presented for the documentation, follow the additional guidelines below in Section 5.7.

(a) Contact the Company's Legal Department and immediately notify them of the government agency's request for documentation.

(b) Contact the appropriate Entergy supervisor to notify him or her of the government agency's request for documentation.

(c) Cooperate with the government investigator, but do not consent to provide any documentation.

(d) Ask if a Civil Investigative Demand, Subpoena or Search Warrant accompanies the request for documentation and, if so, request a copy of the Civil Investigative Demand, Subpoena or Search Warrant.

(e) Wait for an attorney from the Company's Legal Department to provide instruction on how to move forward with the request for documentation.

5.5. Government Request for an Interview. When government officials request an interview with an employee, agent or contractor, whether or not on the Company's premises, the employee, agent or contractor shall notify the Company's Legal Department of the request for an interview and provide the name, agency affiliation, business telephone number and address of the government official, and the reason for the interview, if known.

(a) The employee, agent or contractor shall ask if a Civil Investigative Demand, Subpoena or Search Warrant accompanies the request for an interview and, if so, request a copy of the Civil Investigative Demand, Subpoena or Search Warrant. If there is no Civil Investigative Demand, Subpoena or Search Warrant, the employee, agent or contractor may refuse to discuss any issues with the government official.

(b) Further, employees, agents and contractors have the option of speaking with the government official with or without the presence of an attorney and may decide to forgo any discussions with the government official until securing legal counsel. If employees desire to have an attorney present at any meeting with the government official, employees may request to consult with a private attorney or with an attorney from the Company's Legal Department prior to the interview.

> (c) If an employee, agent or contractor decides to speak with a government official without an attorney from the Company's Legal Department present or without the Company's permission to speak on the Company's behalf, the employee, agent or contractor may be liable for any improper disclosure of any information provided to the government official regardless of whether the information harms the Company or whether or not private legal counsel has been obtained.
>
> (d) Should an employee, agent or contractor participate in an interview, it is important that the interviewee understand what the interview is about. The interviewee should always obtain clear and proper identification from a government agent before beginning an interview and make sure that he or she understands the purpose of the interview, the purpose of the investigation, and his or her status in the investigation. The Company's Legal Department can help the interviewee understand what the interview and investigation are about and what the Company's rights and obligations are in such a situation. Further, the interviewee's answers matter greatly in any investigation. Any answers given must first of all be true and in addition must accurately represent the interviewee and the Company to the investigator. The interviewee should remember to give clear and unambiguous answers, asking himself or herself whether the investigator could read something unintended into the answer. If so, the answer should be given in a different way or clarification of statements already made should be made. Speculation should be avoided as speculative answers are easily misunderstood and can be inaccurate.

F. Complaint Allegations

The Complaint alleges that when the Respondent issued a verbal warning to Amaral on May 25, 2015, it violated Section 8(a)(3) and (1) of the NLRA because that discipline was discriminatorily imposed on the basis of Amaral having engaged in concerted protected activity by complaining about the removal of the water cooler and having acted as a union steward to seek the return of the water cooler. The complaint also alleges that the Respondent is violating Section 8(a)(1) of the NLRA because its "code of entegrity" and policy statements on "discrimination and harassment prevention," "use of internal/external social media sites," "protection of information," "issue resolution," and "government investigations" all contain overbroad restrictions that unlawfully interfere with employees' exercise of their Section 7 rights. In addition the General Counsel alleges that Amaral's May 20 verbal warning was issued pursuant to unlawfully overbroad provisions and therefore that the Respondent violated Section 8(a)(1) when it imposed the discipline.

III. Analysis

A. PRELIMINARY MATTERS

The Respondent argues that the Board's Regional Director exceeded his authority by issuing a complaint that, in addition to alleging that the Company discriminatorily disciplined Amaral in violation of the NLRA, also alleges that the Company maintained provisions that unlawfully interfere with employees' exercise of their statutorily protected right to engage in protected concerted and union activity. For this proposition, the Respondent relies on a Board decision which states that "Section 10(b) makes clear that the Board may only issue complaints and hold hearings regarding unfair labor practices' [w]henever *it is charged* that any person has engaged in or is engaging in any such unfair labor practice." *Allied Waste Servs.*, 2014 WL 7429200 (Dec. 31, 2014) (emphasis added by Board decision). The Respondent's argument stumbles even before it leaves the starting gate because the Union *did* file charges regarding *every single one* of the policies that the complaint alleges are unlawful. Although the earliest Union charge consolidated in this proceeding concerned the discipline of Amaral, the Union subsequently filed other charges, also consolidated in this proceeding, which allege that the Respondent unlawfully maintained and enforced "overly broad rules and policies" that "include, but are not limited to: Code of Entegrity [and] Discrimination[,]Harassment Prevention," GC Exh. 1(j), "Employee Use of Internal or External Social Media Sites," GC Exh. 1(l), Entergy System Policies & Procedures – Protection of Information," GC Exh. 1(s), "Government Investigations," and "Issue Resolution," GC Exh. 1(u). The fact that the Union filed charges concerning all of the allegations in the Complaint eliminates any conceivable merit that the Respondent's argument based on *Allied Waste* might otherwise have.[4]

The Respondent also argues that the Union "waived any argument that the challenged polices are unlawful" and cites a management rights clause in the parties' collective bargaining agreement, which states that the Respondent has the right to "establish or continue policies" and that doing so "does not require any prior negotiation with the Union." R Exh. 14. at Section 4.01. The Respondent's argument misses the point. The allegation in this case is not that the Respondent adopted the policies without meeting an obligation to negotiate with the Union, but that the Respondent maintained policies that unlawfully interfere with employees' federally protected rights under Section 7 of the NLRA. In other words, even if (and this is a big "if") the Respondent could show that, by agreeing to the management rights provision involved here, the Union had waived bargaining over the adoption of the relevant provisions, [5] it would not be a defense in this case because that would only waive *bargaining*, not as the Respondent asserts "waive[] *any argument* that the challenged policies are unlawful." If it were not clear enough that the management rights clause does not preclude the Union from maintaining unfair labor practice claims regarding unlawful interference with employees' protected activity, that fact is hammered home by other language in management rights clause itself. In language that the Respondent chooses not to address in its brief, the management rights clause explicitly states that while "[t]he exercise of such management rights . . . does not require any prior negotiation with the Union," "nothing in this Article shall preclude or otherwise infringe upon the Union's right to . . . pursue . . . unfair labor practice charges or any and all other relief provided under state

[4] On October 19, 2016, the Respondent made the same argument to the Board as part of a motion for special permission to appeal an evidentiary ruling made at the hearing. As of the date of the instant decision, the Board had not acted on the Respondent's motion.

[5] A party asserting contractual waiver of bargaining has the burden of showing that the waiver is explicitly stated, clear and unmistakable. *Metropolitan Edison Co,.* 460 U.S. 693, 709 (1983); *Quality Roofing Supply Co.*, 357 NLRB 789 (2011). In this case, the management rights clause does not identify the specific policies at-issue and there was no bargaining history showing that waiver of the right to bargain over those policies was considered and intended. See *Minteq Int'l, Inc.*, 364 NLRB No. 63, slip op. at 4-5 (2016), enfd. 2017 WL 1521553 (D.C. Cir. 2017).

and/or federal law in response to the same." R Exh. 14 at Section 4.01. In other words, the management rights clause by its express terms permits the Union to maintain a challenge to the lawfulness of any policies, adopted pursuant to that clause, which interfere with employees' statutorily protected activities.

The Respondent also argues that the Union waived "any argument that the challenged policies are unlawful," because it did not make proposals to change those policies during negotiations for a successor collective bargaining agreement and did not file grievances challenging the policies. As with the Respondent's contention based on the contractual management rights clause this argument misses the point because it would, at most, show that the Union had waived bargaining over the policies, not that it waived the right to pursue unfair labor practices claims regarding employer policies that prohibit employees from engaging in Section 7 activity. At any rate, the policies at-issue here are not part of the collective bargaining agreement, but rather separate documents that were created by the Respondent and which are not signed, or agreed to, by the Union. Under these circumstances, nothing much can be gleaned from the fact that the Union, and it seems the Respondent, did not choose to inject negotiations over these, or other separate, policies into bargaining over the collective bargaining agreement. To the extent that the Respondent means to suggest that statutory access rights have been implicitly surrendered by the absence of any mention of them in the collective bargaining agreement, that argument is foreclosed by the Board's holding that such absence does not surrender existing statutory rights. *Chevron U.S.A., Inc.*, 244 NLRB 1081, 1085 (1979) (Section 7 rights are "not waived by their absence from the governing collective-bargaining agreement.").

Regarding the argument that the Union "waived any argument that the challenged policies are unlawful" because it did not contest those policies in a grievance, the Respondent provides no authority that deprives the Union of the right to choose which of the available avenues it will use to challenge an unfair labor practice. To the contrary, it is up to the charging party to decide whether to seek a remedy by filing a charge with the Board or by pursuing internal processes or by doing both. See, e.g., *Teamsters (Guy's Foods, Inc.)*, 188 NLRB 608 (1971), enfd. 1971 WL 2990 (8th Cir. 1971). I reject the Respondent's attempt to create a general requirement that would deny aggrieved parties access to the Board's processes unless they first attempted to obtain relief through an internal process.

B. AMARAL VERBAL WARNING

The General Counsel alleges that the Respondent issued the May 25 verbal warning to Amaral because she engaged in concerted protected activity and union activity when she complained about the removal of the water cooler and that the discipline was therefore discriminatory in violation of Section 8(a)(1) and Section 8(a)(3) and (1) of the NLRA.[6] In their briefs, both the General Counsel and the Respondent analyze this allegation pursuant to the burden shifting approach set forth in the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). However, the *Wright Line* analysis is not appropriate where, as here, the employer defends the disciplinary action based on misconduct that is part of the res gestae of the employee's otherwise protected concerted and/or union activity. In that circumstance, the causal connection that the *Wright Line* approach is designed

[6] The General Counsel also alleges that the discipline was issued pursuant to unlawful provisions of the Respondent's code of entegrity and discrimination and harassment prevention policy and therefore that the discipline violated the Act. The allegations regarding those provisions, including that Amaral was unlawfully disciplined pursuant to them, is discussed infra at Section III.C. 1.

to ascertain is not in dispute. *Roemer Industries, Inc.*, 362 NLRB No. 96, slip op. at 7 n.15 (2015), enfd. 2017 WL 1806537 (6th Cir. 2017). The appropriate framework in the circumstances present here is, instead, the one the Board set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), which analyzes whether in the course of otherwise protected activity the employee engaged in conduct that caused him or her to forfeit the NLRA's protection. Pursuant to *Atlantic Steel*, the determination about whether the employee's conduct caused him or her to forfeit the NLRA's protection is based on a "careful balancing" of the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. 245 NLRB at 816. For the reasons discussed below, I find that Amaral was engaged in protected concerted and union activity when she expressed concerns about removal of the water dispenser to Lowther, but that she engaged in conduct in the course of that activity that caused her to forfeit the NLRA's protection.

Employees engage in protected concerted activity when they act "with or on the authority of other employees and not solely by and on behalf of the employee himself." *Meyers Industries,* 268 NLRB 493, 496-497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), on remand, *Meyers Industries,* 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In the instant case, Amaral was raising a group concern when she discussed the removal of the water dispenser with Lowther on March 13. Earlier that day, Amaral had been approached by employees who complained about the removal of the water dispenser and asked Amaral what action she planned to take about it. During her interaction with Lowther, Amaral referenced what she said was the poor morale among security officers generally, and said that Lowther "need[ed] to do something about it." Similarly, the condition report that Amaral submitted earlier on March 13 referenced the hardship that removal of the water dispenser placed on the "the Security Force," not on herself alone. The evidence shows that Amaral's complaint to Lowther was about group concerns, and that she made her complaint not solely on her own behalf, but also at the behest of, and on behalf of, other employees. Therefore, I find that Amaral was engaged in protected concerted activity when she complained to Lowther on March 13. Ibid.; see also *TM Group, Inc.*, 357 NLRB 1186, 1199 (2011) (activity is concerted where it arises out of prior group activity or where the employee is acting formally or informally on behalf of the group). In addition, since Amaral was a union steward, and since her responsibilities in that role include advocating for unit employees, she was also engaged in union activity when she raised unit employees' concerns about the water dispenser and about the morale of unit employees. *H&M Int'l Transportation, Inc.*, 363 NLRB No. 139, slip op. at 25 (2016), citing *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976).[7]

Since the Respondent disciplined Amaral for conduct in the course of otherwise protected activity, the question, under *Atlantic Steel*, supra, is whether that conduct caused Amaral to lose the Act's protection. The first factor, the place of the discussion, weighs in favor of finding that Amaral forfeited the Act's protection. She began her high-volume, profanity-laced, outburst in a restroom where privacy concerns would reasonably lead the employee on the receiving end to feel particularly uncomfortable or vulnerable. Cf. *Station Casinos*, 358 NLRB 1556, 1632 (2012) (when the conduct that allegedly caused the employee to forfeit the NLRA's protection took place in a bathroom commonly used by guests, the location was "not

[7] Although knowledge that Amaral was a steward when she brought these concerns to Lowther's attention is not a prerequisite to finding that she was engaged in union activity, the record shows that the Respondent was aware of Amaral's union status and that Daly, one of the management officials who made the decision to discipline her, had recently received an email from the Union identifying Amaral as a steward.

ideal" for purposes of *Atlantic Steel* analysis)[8] and *Anheuser-Busch, Inc.*, 342 NLRB 560, 566 (2004) (surveillance in restroom raises privacy concerns). Indeed, although Lowther's subjective experience of discomfort is not determinative,[9] her credible testimony that she found Amaral's outburst "uncomfortable . . . especially in the ladies room," is consistent with my view that the location was objectively a problematic location for such an outburst. When Lowther fled the bathroom, Amaral followed her and continued to loudly, and profanely, accost her in the hallway. The evidence indicates that this hallway was an area where the outburst might be heard by employees and could compromise the trust that Lowther reasonably believed she had to maintain to do her job.

The second *Atlantic Steel* factor, the subject matter of the discussion, weighs modestly in favor of continued protection. Amaral was discussing the problems that removal of the water dispenser caused for security officers. I do not see this as weighing more heavily in favor of continued protection because Amaral had first discovered the removal of the water dispenser just hours earlier and had already submitted a complaint on the subject through the condition report system. The Respondent would hardly have had an opportunity to address that condition report when Amaral raised the same issue with Lowther. The subject was not, at the time that Amaral yelled at Lowther, a critical one and the condition report process had already been invoked to remedy it. Indeed the evidence shows that Amaral discovered that the water dispenser was missing on a Friday and that by the following Monday, the condition report system had resulted in Noyes approaching Amaral to discuss the issue, and directing Mock to replace the water dispenser or otherwise provide for a continuous supply of water at the primary gate. That all happened without regard to Amaral's altercation with Lowther, of which Noyes was unaware when he acted to return water to the primary gate post.

The third *Atlantic Steel* factor, the nature of the outburst in my view weighs heavily in favor of finding that the Amaral's conduct lost the Act's protection. It is important to keep in mind when considering this factor that Amaral is a paramilitary officer who was heavily armed at the time of her altercation with Lowther. Amaral herself stated that during the incident she became so agitated that she was "seeing red" and "blacked out." A heavily armed, paramilitary officer, who allows herself to engage in such an outburst under the circumstances present here has engaged in conduct that is sufficiently opprobrious as to require corrective discipline. *Atlantic Steel*, 245 NLRB at 816 ("[T]he Board and the courts have recognized . . . that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act."). Moreover, although Amaral did not make any express threats to Lowther, I find that under the circumstances it would be reasonable for an employee to find her conduct threatening.

The General Counsel correctly notes that the use of profanity in the Respondent's workplace was common. The instant case, however, did not simply involve Amaral using profanity during humorous or grousing comments at the facility. Rather it involved the heavily-armed Amaral using profanity while yelling at Lowther, becoming so enraged that she saw "red" and "blacked out," and then following the retreating Lowther down the hallway to continue the profanity-laced outburst. The record does not establish any instances at the facility where, like Lowther, an employee complained about comparable behavior and discipline did not result. On the other hand, the record did show at least one instance when an employee – D'Andrea – directed a profane outburst at another individual at the facility and was suspended for that

[8] This Board decision was issued during a period when the Supreme Court later found that the Board lacked the necessary quorum. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). I do not rely on the Board's decision as precedent, but cite it for its persuasive value.

[9] See *Chartwells, Compass Group, USA,* 342 NLRB 1155, 1157 (2004).

conduct. Indeed, when a supervisor directed a single profanity at Amaral herself, she complained to a manager who then discussed the conduct with the offending supervisor.

The final *Atlantic Steel* factor – whether the outburst was provoked by an employer's unfair labor practice, also weighs against continued protection. The General Counsel concedes that "there is no evidence that [Amaral's heated exchange with Lowther] was provoked by any unfair labor practice on the part of the Respondent." Brief of General Counsel at Page 81. I agree. It would be a stretch to construe the Respondent's failure to address Amaral's objection to the sudden disappearance of the water cooler within a few hours as an unfair labor practice. At any rate, Lowther was not responsible for the removal of the water dispenser and did not herself have authority to return it. The record indicates that Lowther had been trying in good faith to respond in a helpful way to Amaral's concerns when Amaral had her outburst.

I find that the three *Atlantic Steel* factors favoring forfeiture of the Act's protection easily outweigh the one factor that weighs in favor of continued protection. Amaral forfeited the Act's protection with respect to her misconduct during the course of her otherwise protected activity concerning removal of the water dispenser.

As noted above, the General Counsel and the Respondent both analyze these allegations using the *Wright Line* burden shifting approach. For the reasons discussed earlier, that is not the appropriate mode of analysis here. However, even were I to analyze the allegations using the *Wright Line* framework, the result would be the same. Under *Wright Line*, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations or by protected concerted activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184-1185 (2011). If the General Counsel satisfies its initial burden, the employer can still show that it did not act unlawfully by demonstrating that it would have taken the same action absent the protected conduct. Ibid.; *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000). In the instant case, even if I assume that the General Counsel could meet its initial burden, the Respondent has rebutted that prima facie case because a preponderance of the evidence shows that Amaral's conduct would have resulted in the discipline even absent any unlawful motive. As discussed above, Amaral was a heavily armed paramilitary officer when she blacked out from anger while yelling at Lowther in the rest room. After Lowther retreated to the hallway, Amaral followed her out and continued the profanity-laced attack. This outburst was all regarding Amaral's complaint about the removal of a water dispenser – a complaint that Amaral had thus far given management only a few hours to address and an action that Lowther had no part in and no authority to reverse. An armed security guard who allows himself or herself to become so agitated in such circumstances cannot expect to escape the imposition of some corrective action. Here the Respondent imposed the lowest level of disciplinary action available, a verbal warning. Although the record did not include any instances of misconduct where the circumstances were closely comparable to Amaral's, the Respondent's disciplinary action was generally consistent with the way the Respondent responded to other outbursts that it received complaints about.

For reasons discussed above, I find that the Respondent did not discriminate in violation of either Section 8(a)(1) or Section 8(a)(3) and (1) of the NLRA on May 25, 2015, when it issued a verbal warning to Amaral for her conduct in the course of otherwise protected concerted and union activity. Those allegations should be dismissed.

C. Allegedly Overbroad Provisions

The General Counsel alleges that the Respondent's code of entegrity and policy statements contain multiple provisions that unlawfully restrict employees' exercise of their Section 7 rights. The Board has held that "[a]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." *Knauz BMW*, 358 NLRB 1754 (2012), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Under this standard, a rule that explicitly restricts Section 7 rights is unlawful. Ibid., citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). If the rule does not explicitly restrict Section 7 rights, the General Counsel may still establish a violation by showing any one of the following: (1) that employees would reasonably construe the language to prohibit Section 7 activity; (2) that the rule was promulgated in response to union activity: or (3) that the rule has been applied to restrict the exercise of Section 7 rights. Ibid. A showing that the employer actually enforced the rule is not necessary to establish a violation. The mere maintenance of such a rule carries with it the possibility that the restriction will be enforced against statutorily protected activity and therefore tends to unlawfully chill employees' exercise of their rights. *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1194-1195 (2004); *Ingram Book Co.*, 315 NLRB 515, 516 (1994).

1. Provisions relating to respectful conduct.

The General Counsel argues that a number of the Respondent's provisions that ostensibly address the need for a respectful, harassment-free, workplace would reasonably be construed by employees to prohibit Section 7 activity and therefore violate Section 8(a)(1) of the NLRA. These provisions, which are set forth above in the statement of facts, include: code of entegrity foreword B.3, section 3 (be a courteous driver), and section 6 (don't hand the keys to a stranger); discrimination and harassment policy provisions 4.3 and 5.5; and internal or external social media site policy provision 5.4.5. Much of the General Counsel's argument regarding these provisions concerns language that, in various formulations, requires employees to treat co-workers in a respectful manner. Specifically, the General Counsel objects to language stating that: "employees have a responsibility to be civil and respectful to co-workers during workplace interactions"; the Respondent "seeks to maintain a work environment that respects the dignity and worth of each individual and is free from harassment and discrimination based on any protected characteristics or protected activities"; the Respondent's policy is to "maintain a work environment that is inclusive and respects the dignity and worth of each individual"; "employees have a responsibility to be civil and respectful to co-workers during workplace interactions"; and that "[e]xamples of prohibited conduct . . . include . . . creating an offensive, hostile or intimidating working environment." The General Counsel cites cases in which the Board found that restrictions arguably comparable to these were found to be unlawfully overbroad because they would reasonably be construed by employees to prohibit some activity protected by Section 7. Brief of General Counsel at Page 52 ff., citing, inter alia, *Beaumont Hospital*, 363 NLRB No. 162 (2016), *Good Samaritan Medical Center*, 361 NLRB No. 145 at 4 (2014), *Karl Knauz Motors,* supra, *2 Sisters Food Group*, 357 NLRB No. 168, (2001), *University Medical Center*, 335 NLRB 1318 (2011), enf. denied in relevant part 335 F.3d 1079 (D.C. Cir. 2003).

In the typical case the provisions referenced in the preceding paragraph might well be unlawful under the Board precedent cited by the General Counsel. However, this is not the typical case given the requirements imposed on the Respondent by another federal agency, the NRC, in recognition of the risks associated with nuclear power production. The Respondent's broad pronouncements requiring employees to maintain a respectful workplace essentially

mirror the NRC's similarly broad pronouncements requiring the Respondent to ensure that "trust and respect permeate the organization," that "[i]ndividuals at all levels of the organization treat each other with dignity and respect," and "do not demonstrate or tolerate bullying or humiliating behaviors." This distinguishes the circumstances of the instant case from those in the Board decisions that the General Counsel relies on. Moreover, the General Counsel does not argue that the Respondent can comply with the NRC's broad requirements that prohibit disrespectful interactions, harassment and bullying, without running afoul of the General Counsel's assertion that broad requirements prohibiting such conduct violate the NLRA. Rather the General Counsel responds to the Respondent's conundrum by essentially ignoring it and implying in passing that no precedent requires the Board to make any accommodation at all to the competing federal objectives embodied in the NRC policy. See Brief of General Counsel at Page 60, fn.59 (Asserting that "Respondent presented no authority, because none exists, to establish that an employer who operates a nuclear power plant is privileged to maintain and enforce against its employees policies that would otherwise violate the [National Labor Relations] Act."). However, the Supreme Court has held that accommodation of competing federal objectives *is* sometimes required when enforcing the NLRA. In *Hoffman Plastic Compounds v. NLRB*, the Supreme Court reversed the Board's decision to award the standard NLRA backpay remedy to an undocumented alien who was discriminatorily discharged. The Court explained that where the standard Board remedy would "potentially trench upon federal statues and policies unrelated to the NLRA," "'the Board is obliged to take into account other "equally important Congressional objectives."'" 535 U.S. 137, 143-144 (2002). The Court noted that the Board's enforcement of the NLRA had in the past been adjusted so as not to encroach on the objectives of the Bankruptcy Code and of federal antitrust policy. Ibid. Decades earlier in *Southern Steamship Co. v. NLRB*, the Supreme Court cautioned: "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." 316 U.S. 31, 47 (1942). The need for such accommodation is implicated in this case and leads me to find that the general provisions identified in the prior paragraph do not violate the NLRA.[10] I note, moreover, that the general provisions that the General Counsel points to as problematic actually prohibit discrimination and harassment on the basis of protected activities, "includ[ing], for example, filing a claim with the Equal Employment Opportunity Commission or another governmental entity."[11] A reasonable reader would be hard pressed to read these same sections, which explicitly shield employees against discrimination on the basis of their protected activities, as implicitly limiting such protected activity.

[10] The Respondent has not shown that any of the other challenged provisions, discussed later in this decision, similarly mirror the requirements of federal nuclear regulatory law or policy.

[11] This is the proper background against which to construe language in section 5.5 of the discrimination/harassment policy, which states that the policy extends to "intimidation, coercion, bullying and other types of disrespectful or abusive conduct, regardless of whether such conduct is based on a Protected Activity, Protected Characteristic and/or otherwise constitutes a technical violation of the law." The only reasonable way to understand that language in the context of the overall policy is as clarifying that disrespectful/abusive/bullying conduct is impermissible not only when it is directed at another based on that individual's protected activity or protected characteristic, but also when it is directed at them on other bases. A reasonable employee would not understand this, as the General Counsel seems to suggest at one point, to be stating that the Respondent is prohibiting protected activity that it deems disrespectful/abusive/bullying.

Given all the circumstances present here, including the relevant NRC requirements, I find that the general provisions that the General Counsel identifies and which discourage or prohibit employees from engaging in disrespectful, harassing, and bullying behaviors towards co-workers do not violate Section 8(a)(1) of the Act.[12]

The General Counsel also attacks language in the Respondent's code of entegrity regarding communications. Specifically it points to language in Section 6. B. of the code, which advises employees not to engage in communications that "include material that is inappropriate, untrue or disparaging to outside parties or to Entergy." GC Exh. 15 at Bates 000025 (Section 6 B). The prohibition at-issue here extends not only to employee communications that are maliciously or intentionally false (and therefore forfeit the protection of the NLRA), but also to employee communications that are "merely false" (and therefore retain that protection); therefore, the provision "fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities." *Lafayette Park Hotel*, 326 NLRB at 828, quoting *American Cast Iron Pipe Co.*, 600 F.2d 132, 137 (8th Cir. 1979). The Board has repeatedly held that such a prohibition is unlawful because it "restrict[s] employees in the exercise of their Section 7 rights by prohibiting statements which are merely false, as distinguished from those which are maliciously so." *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994); see also *Casino San Pablo*, 361 NLRB No. 148, slip op. at 4 (2014) ("rule prohibiting false, fraudulent, or malicious statements is overbroad and thus violates Section 8(a)(1)") and *First Transit Inc.*, 360 NLRB 619, 620-621 (2014) (rule prohibiting "inappropriate attitude or behavior" was imprecise and unlawfully overbroad). Similarly, the Board has held that prohibitions on employees making "disparaging" statements about an employer or employees are overly broad because they chill employees' exercise of Section 7 rights. *Lily Transp. Corp.,* 362 NLRB No. 54 (2015); *Golden Bridge Rest.*, 356 NLRB No. 78 (2011).

Under the Board precedent cited above, the Respondent's rule prohibiting "untrue or disparaging" communications would be plainly unlawful were it not for the fact that the Respondent has included language that is often referred to as a "savings clause" in the same section. That savings clause provides that nothing in the section restricts the "employee's rights under any federal . . . labor or employment law, or regulation, ... includ[ing, but] not limited to the right to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment, such as the right to discuss his or her wages, benefits and employment conditions with others." In *First Transit, Inc.*, the Board held that a savings clause "may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule." 360 NLRB at 621. To decide whether the savings clause remedied the prohibition in that case, the Board looked to considerations such as: whether the language "address[es] the broad panoply of rights" protected by Section 7; the length of the document and the placement of the savings clause in relation to the ambiguous rules that it is claimed to remedy; whether the savings clause and the ambiguous rules

[12] As I discuss above, in Section III B of this decision, the General Counsel has not shown that the Responded discriminated in violation of either Section 8(3) or Section 8(a)(1) when it issued a verbal warning to Amaral on May 25, 2015. In addition to contending that Amaral's discipline was unlawfully discriminatory, the General Counsel contends that the discipline was a violation of Section 8(a)(1) because it was issued pursuant to unlawful restrictions in Section 3 of the foreword to the code of entegrity and/or Sections 4.3 and 5.5 of the discrimination and prevention policy. Brief of the General Counsel at Page 82-83, citing *Dish Network, LLC*, 363 NLRB No. 141 (2016), *Continental Group, Inc.*, 357 NLRB 409, 412 (2011), and *Double Eagle Hotel & Casino*, 341 NLRB 112, 116 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). Since the General Counsel has failed to show that those provisions violate Section 8(a)(1), the General Counsel has also failed to show that Amaral's discipline, because it was based on those provisions, violated Section 8(a)(1).

reference each other; and whether the employer has enforced the overbroad rule in a way that shows employees that the savings clause does not safeguard their Section 7 rights. Id. at 621-622; see also *Care One at Madison Avenue*, 361 NLRB No. 159, slip op. at 4 n.8 (2014), enfd. 832 F.3d 351 (D.C. Cir. 2016). In deciding whether a savings clause has succeeded in rendering an employer's otherwise impermissible prohibition lawful, the Board construes any ambiguity against the employer as the drafter of both the prohibition and the savings clause. *Century Fast Foods, Inc.*, 363 NLRB No. 97, slip op. at 11 (2016).

Although I consider it a close call, I find that the savings clause language does not remedy the otherwise unlawfully overbroad language prohibiting "untrue or disparaging" communications. At bottom the question is whether an employee would reasonably be expected to construe the savings clause to mean that the Respondent's rule was not prohibiting "merely false" statements, but only statements that had lost the NLRA's protection because they were maliciously or intentionally false. Although factors such as the saving clause's placement within the document and the breath of the Section 7 rights referenced in it weigh somewhat in the Respondent's favor, neither of those factors would in my view lead employees to reasonably understand the policy as absolving employees who make "merely false" statements in the course of Section 7 activity. The savings clause and the prohibition on untrue or disparaging communications do not refer to each other in any meaningful way. *First Transit*, supra. The prohibition expressly refers to untrue and disparaging statements, but the savings clause does contain any language expressly addressing untrue or disparaging statements, or any other language that, without the application of legal analysis, would lead a reader to conclude that the Respondent is only prohibiting statements that are maliciously or intentionally untrue. The Board's decision in *Ingram Book Co.*, addressed this circumstance and held that a savings clause did not remedy an otherwise overbroad rule where the effect of reassurances in the savings clause on the overbroad rule could only be understood through the application of legal analysis. 315 NLRB at 516 n.2 (savings clause did not remedy an overbroad prohibition because "[r]ank-and-file employees do not generally carry law books to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint"). In the instant case, the savings "clause at best creates an ambiguity which must be construed against the Respondent" as the "drafter" of both the prohibition and the savings clause. *Century Fast Foods, Inc.*, supra.

For the reasons discussed above, I find that since at least December 11, 2014, the Respondent has violated Section 8(a)(1) by maintaining an overly broad restriction on communications by employees.

2. Provisions relating to confidentiality and protection of company property.

The Complaint alleges that a number of the Respondent's provisions that purport to address the need for confidentiality and the protection of company property would reasonably be construed by employees as prohibitions on some types Section 7 activity. These provisions, which are set forth above in the statement of facts, include: code of entegrity provision foreword B.6 and section 6 (don't hand the keys to a stranger/protect company property and information); protection of information policy sections 3.1, 3.7, 3.14 5.1.2, 5.1.4, 5.2, 5.6, 5.6.1, and 5.7; use of internal or external social media sites section 5.4.4; and issue resolution policy section 5.13.

With respect to the confidentiality provisions in the code of entegrity, the language that the General Counsel objects to: directs employees to "protect company property and information"; defines "company information" as "company property" and prohibits its unauthorized use; and directs employees to protect sensitive or confidential information against disclosure "to parties, both inside and outside of the company, who do not have a legitimate business 'need to know.'" The General

Counsel states that the Respondent has violated the Act by maintaining "such a broad directive, without making clear to employees that they are privileged to share wage information, or other information relating to their terms and conditions of employment with, for example, Union representatives." Brief of General Counsel at Page 64. The problem with this argument is that this confidentiality section includes a savings clause that *does* make clear to employees that they are privileged to share information regarding their wages and other terms and conditions of employment. Specifically, the confidentiality section advises employees that nothing in it "restrict[s] and employee's rights under any federal . . . labor or employment law, or regulation, to discuss his salary, wages, hours, or other terms and conditions of employment with nonemployees or with other employees," and moreover, that nothing in it limits employee rights "to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment such as the right to discuss his or her wages, benefits and working conditions with others." I considered how an employee would reasonably construe this provision using the factors the Board looked to in *First Transit,* 360 NLRB at 621, and find that the savings clause adequately addresses the ambiguity that the General Counsel identifies as problematic. The savings clause is in the same section as, and in proximity to, the problematic confidentiality prohibition in the code of entegrity. In addition, the clause addresses not only "the broad panoply of rights protected by Section 7," Ibid., but also specifically and clearly addresses the specific concern the General Counsel raises regarding an employee's rights to engage in protected activity by sharing information regarding their wages and other terms and conditions of employment with both employees and nonemployees. The record does not show that the Respondent has taken any action that would lead employees to read the savings clause in the confidentiality provision as something less than a "safeguard of their Section 7 rights" in that regard. Ibid.

For these reasons I find that the General Counsel has not shown that the provisions in the code of entegrity that relate to the protection of confidential or sensitive information are unlawfully overbroad.

The Respondent also discusses limitations on employees' use of company information in a separate "protection of information" policy. The sections of the protection of information policy identified in the complaint are 3.1, 3.7, 3.14 5.1.2, 5.1.4, 5.2, 5.6, 5.6.1, and 5.7. The General Counsel's stated concerns regarding these provisions are: 1) that the prohibitions regarding confidential and sensitive information "make no effort to clarify that they do not include employee information, thus reinforcing the likely inference that employees may not discuss their wages," 2) that the restrictions on the use of the Respondent's name, logo, and other trademark material, would interfere with employees' Section 7 right to use such material on, for example, signs, leaflets and other protest materials, and 3) that the prohibitions on taking photographs, or making audio or video recordings within the facility would reasonably be read to prohibit employees from taking pictures or making recordings on non-work time for Section 7 purposes. Brief of General Counsel at Pages 64-66.

The Respondent's protection of information policy states that employees are required to protect both "employee information" and "employee records" from disclosure. In addition, the policy defines "employee information" as "confidential information," Section 3.1, that employees are prohibited from disclosing to "all parties both inside and outside the Company, who do not have a legitimate business 'need to know' for purpose of the Company's operations or management," Section 5.2. The policy defines "employee records" as "sensitive information," Section 3.14, that employees are prohibited from sharing, "with any person or entity that does not have a legitimate need for it in the performance of Entergy business," Section 5.3. Here too, it would be clear that these limitations on the use of employee information and records unlawfully interfere with employee's rights to engage in

protected activities by discussing their terms and conditions of employment,[13] were the issue not complicated by the Respondent's inclusion of a savings clause in Section 5.6 – the "employee records" provision in the policy. That provision, which defines "employee records" and states limits on their use, contains the following savings clause language:

> Nothing in this Policy is intended to restrict an employee's rights under any federal, state or local labor or employment law, or regulation, except to the extent such rights are clearly waived by the express terms of a current collective bargaining agreement. These employee rights include, but are not limited to, the right to engage in protected concerted activity for mutual aid and protection, and the right to engage in protected concerted activity relating to wages, hours and other terms of employment, such as the right to discuss his or her wages, benefits and employment conditions with others.

GC Exh. 15 at Bates 000011.

With respect to the employee records provision, Section 5.6, I find – after examining the considerations the Board looked to in *First Transit,* supra – that the savings clause adequately addresses the ambiguity in the otherwise overbroad provision. Section 5.6 is less than a page long and approximately one-third of it is devoted to the savings clause language, quoted above, which emphatically assures employees that the section does not limit their rights under federal labor law and expressly affirms their right to engage in protected concerted activity relating to wages and other terms and conditions of employment. The Respondent was not shown to have taken any action that would lead an employee to reasonably doubt that the savings clause is a "safeguard of their Section 7 rights." Ibid.

The General Counsel has not shown that Section 5.6 of the Respondent's protection of information policy is unlawful.

The same considerations lead to a different result with respect to other challenged provisions in the "information protection" policy. Those provisions that prohibit employees from disclosing "employee information" (as opposed to "employee records"[14]) contain no similar savings clause language, make no reference to the savings clause language in the employee records section and are not situated in close proximity to the savings clause within the 15-page policy. The "employee information" provisions of the policy fail to clarify that they do not prohibit employees from disclosing such information as part of NLRA-protected activity.

I find that since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 3.1 and Section 5.2 of its information protection policy, which contain overly broad restrictions on the disclosure of "employee information" and interfere with employees' rights to engage in activities protected by the NLRA.

I also find that other challenged provisions in the information protection policy that prohibit employees from sharing "employee records," but which are not in proximity to Section 5.6 and do not include savings clause language are unlawfully overbroad. For example, Section 3.14 and Section 5.3, which define employee records as sensitive information that employees are prohibited from sharing, make no reference to Section 5.6 or its savings clause, and appear several pages, and

[13] See *Rio All-Suites Hotel and Casino*, 362 NLRB No. 190 (2015), *Flex-Frac Logistics, LLC*, 358 NLRB 1131 (2012), enfd. 746 F.3d 205 (5th Cir. 2014), *IRIS U.S.A., Inc.*, 336 NLRB 1013, (2001).

[14] The policy does not use the terms "employee information" and "employee records" interchangeably. For example, the policy classifies "employee information" as confidential, but classifies "employee records" as sensitive.

multiple sections on other topics, distant from the savings clause. Moreover, the savings clause in Section 5.6 does not appear in an introductory or concluding portion of the policy where, one might argue, it would reasonably be read as applying to the entire policy. Under these circumstances, I find that Section 3.14 and Section 5.6 are unlawfully broad and interfere with employees' rights to engage in activity protected by the NLRA.

I find that since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 3.14 and Section of 5.3 of the information protection policy which contain overbroad prohibitions regarding the use of employee records that interfere with employees' exercise of their rights to engage in protected activity.

The General Counsel also alleges that Section 5.4.4 of the Respondent's social media policy unlawfully interferes with employees' NLRA-protected activities. Section 5.4.4. prohibits employees from using social media to make "Entergy's or another's confidential or other proprietary information" available. However, that section – which is comprised of a single seven-line paragraph – concludes: "Such policies will not be construed to limit your right to speak with others regarding your wages and other terms and conditions of employment." The General Counsel does not address the savings clause language, or state what unlawful ambiguity persists despite it. I find that even if one assumes that the language prohibiting employees from using social media to share the Respondent's confidential or proprietary information, when viewed in isolation, could chill Section 7 activity, the presence of the savings clause in the same short paragraph as the challenged language, alleviates any chilling effect.

I find that Section 5.4.4 of the Respondent's social media policy does not violate Section 8(a)(1) of the NLRA.

The General Counsel also challenges Section 5.1.2 of the Respondent's protection of information policy, which prohibits employees from allowing any outside party to use "the name of any Entergy Company and any Entergy logo . . . without prior approval from" management officials. In order to comply with the plain language of this prohibition, employees would have to refrain from using the company's logo, or even the company's name, on picket signs, union literature, or union paraphernalia unless managers approved. The Respondent has not produced evidence establishing the existence of a business reason that would outweigh the employee's right to use such material in activity protected by the NLRA. Under the Board's decisions involving employee use of a company logo, and given the circumstances present in this case, the Section 5.1.2 prohibition on employees' use of the Respondent's logo and name for Section 7 activities "is an excessive impediment to employee" protected activity and violates the NLRA. *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1020 (1991) (employer prohibition on display of company logo while engaging in activity protected by the NLRA is an unlawful infringement of Section 7 rights in the absence of a business reason), enfd. 953 F.2d 638 (4th Cir. 1992); see also *Cy-Fair Volunteer Fire Dept.*, 364 NLRB No. 49 (2016) (same) and *Boch Honda*, 362 NLRB No. 83 (2015), enfd. 826 F.3d 558 (1st Cir. 2016) (same). There is no savings clause language in this section or elsewhere in the policy that mentions the use of the Respondent's name or logo for protected activity.

Since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 5.1.2 of its protection of information policy, which sets forth overbroad prohibitions on the use of the Respondent's name, logo and other trademark material that interfere with employees' exercise of their rights to engage in protected activity.

The General Counsel also takes issue with Sections 5.1.4 and 5.7 of the Respondent's information protection policy, which prohibit employees from photographing, video-recording or audio-recording anything at the facility and/or anything that includes information that the Respondent deems

confidential or an "information asset," without the approval of the Respondent. This prohibition runs afoul of employees' rights under Section 7 of the NLRA to take photographs or make audio or video recordings as part of their protected activities. See *Whole Foods Market, Inc.* 363 NLRB No. 87, slip op. at 4 (2015), *Rio All-Suites,* 362 NLRB No. 190, slip op. at 4, *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (2011), enfd. sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012). The Respondent has not shown that its imposition of blanket prohibitions on photographing or recording at the facility are necessitated by NRC rules or publications, or by any legitimate business need. Under these circumstances, the blanket prohibitions are overly broad and unlawfully interfere with employees' exercise of their rights to engage in activity protected by the NLRA. *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 3-4 (2016); *Whole Foods Market,* supra; *Rio All-Suites Hotel & Casino*, supra. In reaching this conclusion I considered the fact that the information protection policy includes savings clause language. However, that language appears in a subparagraph of the policy section relating to a different subject – employee records. It appears in the middle of the 15-page document and makes no reference to employees photographing or recording at the facility or to the sections of the information protection policy that prohibit such activity. Under these circumstances one cannot argue that the savings clause safeguards the rights of employees to photograph and record at the facility during non-work time for purposes of activity protected by the NLRA.

Since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 5.1.4 and 5.7 of its protection of information policy, which set forth overbroad restrictions on photographing and recording that interfere with employees' exercise of their rights to engage in protected activity.

The Respondent's issue resolution policy sets forth a process by which issues between non-unit employees and the Respondent may be investigated and resolved. The General Counsel takes issue with the confidentiality provision in that policy, Section 5.13, which prohibits employees, without the approval of the senior vice president of human resources, from discussing with, or disclosing to, individuals who do not "have a legitimate business need to know," any information collected by the decision making panel. The Board has held that "an employer may prohibit employee discussion of an investigation only when its need for confidentiality with respect to that specific investigation outweighs employees' Section 7 rights." *Boeing Co.*, 362 NLRB No. 195, slip op. at 2 (2015), citing *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 2-3 (2015), enfd. 851 F.3d 35 (D.C. Cir. 2017). Under Board decisions, an employer can only lawfully make such a determination on a case-by-case basis and by considering "whether the particular circumstances of an investigation create legitimate concerns of witness intimidation or harassment, the destruction of evidence or other misconduct tending to compromise the integrity of the inquiry." Ibid. A "blanket" confidentiality provision, such as the one the Respondent imposed here, "clearly fail[s] to satisfy this requirement and thus interfere[s] with employees' Section 7 rights." Ibid.; see also *SNE Enterprises*, 347 NLRB 472, 472 fn.4 and 492-493 (2006) (confidentiality rule that applied after the investigation was completed cannot be justified as necessary "to protect the sanctity of an ongoing investigation"), enfd. 257 Fed. Appx. 642 (4th Cir. 2007). The Respondent has not shown that the blanket prohibition is necessitated by a NRC requirement or a legitimate business reason.

Since at least October 1, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 5.13 of its issue resolution policy, which sets forth an overbroad confidentiality restriction on information gathered in the issue resolution process.

3. Provisions relating to Government investigations.

Lastly, the General Counsel challenges provisions that place restrictions on employee participation in government investigations. The complained of provisions are code of entegrity Section 5. I. and policy on government investigations Sections I (policy summary) and 5.1 through 5.5. These provisions, which are set forth more fully in the statement of facts, inter alia: prohibit employees from answering any questions posed by a government investigator without first contacting the company's legal department; prohibit employees from providing any documents requested by a government investigator without first contacting the company's legal department; require employees to refer any government requests for an investigative interview to the company's legal department; state that "an employee should contact the legal department before contacting a governmental agency about the company's business"; and warn that an employee who chooses to speak with a government official without the presence of a company attorney and without company approval "may be liable for any improper disclosure of any information." The policy on government investigations makes certain exceptions for communications with a small number of identified government agencies, including the NRC, but makes no exception for communications with the NLRB or which otherwise safeguard employees' independent access to the NLRB's processes.

The Supreme Court has recognized that guaranteeing the public coercion-free, independent, access to the NLRB's processes is key to "the functioning of the [National Labor Relations] Act as an organic whole." *NLRB v. Marine & Shipbuilding Workers Local 22*, 391 U.S. 418, 424 (1968); see also *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). In the instant case, employees would reasonably understand the Respondent's policies to prohibit them from initiating contact with the NLRB, responding to the inquiries of NLRB investigators, providing information to the NLRB, or responding to NLRB subpoenas unless the company's legal department is informed about and/or permits it. Such restrictions unlawfully interfere with employees' independent communications with the NLRB and its representatives.[15]

The Respondent has violated Section 8(a)(1) of the NLRA by imposing overly broad restrictions on employees' contacts with government agencies since at least December 11, 2014, by maintaining Section 5.I. in the code of entegrity, and since at least October 1, 2015, by maintain Sections I. and 5.1 to 5.5 of the policy on government investigations.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. United Government Security Officers of America, Local 25 (Union or Charging Party) is a labor organization within the meaning of Section 2(5) of the Act.

3. Since at least December 11, 2014, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 6.B. of its code of entegrity, which contains an overly broad restriction on employee communications that interferes with employees' exercise of their rights to engage in protected activity.

4. Since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 3.1 and Section 5.2 of its information protection policy, which contain an overly broad prohibition on the disclosure of "employee information" and interfere with employees' exercise of their rights to engage in protected activity.

[15] The administrative law judge reached the same finding in *DISH Network Corp.*, 359 NLRB No. 108, slip op. at 6 (2013), citing *Karl Knauz BMW,* supra, however, that finding was not challenged before, or ruled on by, the Board.

5. Since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 3.14 and Section of 5.3 of the information protection policy which contain overly broad prohibitions regarding the use of "employee records" that interfere with employees' exercise of their rights to engage in protected activity.

6. Since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 5.1.2 of its protection of information policy, which sets forth overly broad prohibitions on the use of the Respondent's name, logo and other trademark material that interfere with employees' exercise of their rights to engage in protected activity.

7. Since at least July 22, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 5.1.4 and 5.7 of its protection of information policy, which set forth overbroad restrictions on photographing and recording that interfere with employees' exercise of their rights to engage in protected activity.

8. Since at least October 1, 2015, the Respondent has violated Section 8(a)(1) of the NLRA by maintaining Section 5.13 of its issue resolution policy, which sets forth an overbroad confidentiality restriction on information gathered in the issue resolution process that interferes with employees' exercise of their rights to engage in protected activity.

9. The Respondent has violated Section 8(a)(1) of the NLRA by imposing overly broad restrictions on employees' interactions with government agencies since at least December 11, 2014, by maintaining Section 5.I. in the code of entegrity, and since at least October 1, 2015, by maintaining Sections I. and 5.1 to 5.5 of the policy on government investigations.

10. The Respondent was not shown to have committed the other violations alleged in the Complaint.

REMEDY

Having found that the Respondent maintains overbroad restrictions that unlawfully interfere with employees' Section 7 activity, I will require the Respondent to rescind the unlawful restrictions.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order. [16]

ORDER

The Respondent, Entergy Nuclear Operations, Inc., Plymouth, Massachusetts,, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or promulgating any over broad rules that unlawfully interfere with employees exercising their rights, guaranteed by Section 7 of the NLRA, to engage in protected union and/or protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the following provisions at the Respondent's Plymouth facility: Section 6.B. of the code of entegrity, which imposes unlawfully overbroad restrictions on employee communications; Section 3.1 and Section 5.2 of the information protection policy, which impose unlawfully overbroad broad restrictions on employees' disclosure of "employee information"; Section 3.14 and Section of 5.3 of the information protection policy, which impose unlawfully overbroad restrictions on employees' use of "employee records"; Section 5.1.2 of the protection of information policy, which imposes unlawfully overbroad restrictions on employees' use of the Respondent's name, logo and other trademark material; Section 5.1.4 and Section 5.7 of the protection of information policy, which impose unlawfully overbroad restrictions on employees' photographing and recording activity; Section 5.13 of the issue resolution policy, which impose unlawfully overbroad restrictions on employees' use of information gathered in the issue resolution process; Section 5.I. in the code of entegrity and Sections I. and 5.1 to 5.5 of the policy on government investigations, which impose unlawfully overbroad restrictions on employees communications with government agencies.

(b) Within 14 days from the date of this Order notify all employees at the Respondent's Plymouth, Massachusetts, facility that the employer provisions referenced in the preceding paragraph are rescinded, void, of no effect, and will not be enforced.

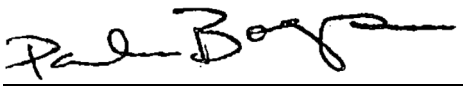
(c) Within 14 days after service by the Region, post at its facility in Plymouth, Massachusetts, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region One, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 12, 2017.



Paul Bogas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain any over broad rules that unlawfully interfere with your rights to engage in protected union and/or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Order, rescind the following provisions maintained at the Pilgrim Nuclear Power Station in Plymouth, Massachusetts: Section 6.B. of the code of entegrity, which imposes unlawfully overbroad restrictions on employee communications; Section 3.1 and Section 5.2 of the information protection policy, which impose unlawfully overbroad restrictions on employees' disclosure of "employee information"; Section 3.14 and Section of 5.3 of the information protection policy, which impose unlawfully overbroad restrictions on employees' use of "employee records"; Section 5.1.2 of the protection of information policy, which imposes unlawfully overbroad restrictions on employees' use of our company name, logo and other trademark material; Section 5.1.4 and Section 5.7 of the protection of information policy, which impose unlawfully overbroad restrictions on employees' photographing and recording activity at the facility; Section 5.13 of the issue resolution policy, which impose unlawfully overbroad restrictions on employees' use of information

gathered in the issue resolution process; Section 5.I. in the code of entegrity and Sections I. and 5.1 to 5.5 of the policy on government investigations, which impose unlawfully overbroad restrictions on employees' communications with government agencies. Once rescinded these provisions will be void, of no effect, and will not be enforced.

ENTERGY NUCLEAR OPERATIONS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, 6th Floor, Boston, MA 02222–1072

(617) 565-6700, Hours of Operation: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-153956 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6701.